

Kamil Azman bin Abdul Razak & Ors v Amanah Raya Bhd & Ors

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)–110–10 OF 2017(W)

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RAMLY ALI, ZAHARAH IBRAHIM, ALIZATUL KHAIR, ROHANA YUSUF AND MOHD ZAWAWI SALLEH FCJJ

30 APRIL 2019

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Contract — Terms — Conditional promises — Whether performance of clauses in consent judgment ('CJ') showed particular order of performance by the respective parties — Whether ss 53 or 55 of the Contracts Act 1950 applied — Whether true construction of CJ showed the clauses therein were not mutually dependent on one another — Whether appellants obligation to repay loans by a certain date was not dependent on whether parties had signed a joint venture agreement ('JVA') — Whether High Court rightly granted declaration releasing one party to CJ from obligation to enter into the JVA as the other party had shown disinterestedness in concluding the JVA — Whether releasing one party to the CJ of its obligations for good reason did not mean Court had set aside or varied the CJ

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Abdul Razak bin Sheikh Mahmood, deceased, ('Abdul Razak') had created a trust ('the Trust') appointing Amanah Raya Bhd ('ARB') as the trustee. About a year later, Amanah Raya Capital Sdn Bhd ('ARC') granted a RM5m loan each to Abdul Razak and to the first appellant ('A1'). Abdul Razak, A1 and ARB later decided to develop a piece of land owned by the Trust. For the purpose of the development, an adjoining plot of land was acquired by Abdul Razak, A1, and another person ('Kalsombi') through a company ('Excel Beat') with a view to undertaking a joint-venture with Amanah Raya Development Sdn Bhd ('ARD') to whom both the lands were sold for a total price of RM5.8m. Later, Abdul Razak, A1, Kalsombi and Excel Beat ('the plaintiffs') sued ARB, ARC, ARD and Amanah Raya Investment Management Sdn Bhd ('ARIM') for breach of trust and/or fiduciary duties including various breaches of duties and mismanagement by ARB as trustee. The parties entered into a consent judgment ('the CJ') in which it was agreed, inter alia, that: (a) the maturity date for Abdul Razak and A1 to repay the loans would be extended for two years until 27 July 2012; and (b) the borrowers or their nominees shall enter into a joint venture agreement ('JVA') with ARD or its nominees on or before 11 August 2010 to develop the lands. The proposed joint-venture never materialised because the parties could not agree on the terms of the JVA. Two years after the CJ was entered into, the plaintiffs sued ARB, ARC and ARD for, among others, an order that the CJ be set aside. The defendants counterclaimed for: (i) a declaration that they, in particular, ARD, be released from any obligation to enter into the JVA; and (ii) an order that the purchase

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- A prices paid by ARD for the two lands be refunded to it. The High Court dismissed the plaintiffs' claim and allowed the counterclaim. At the same hearing, the court allowed ARC's suit against Abdul Razak and A1 to recover the outstanding amounts under the loans. The instant appeal was against the Court of Appeal's affirmation of the High Court's decision in both the suits.
- B At the instant appeal hearing, the appellants contended that the CJ consisted of mutual promises and obligations and that their obligation to repay the loans by the extended maturity date did not arise if the parties had not entered into the JVA earlier as agreed. The appellants relied upon ss 53 and 55 of the Contracts Act 1950 to show that the 'order of performance of obligations' had to be
- C adhered to. The appellants contended that the courts below should not have released the respondents of their obligation to enter into the JVA without correspondingly releasing the appellants of their obligations under the CJ and that by discharging only the respondents, the courts below had effectively set
- D aside or varied a part of the CJ. The appellants also argued that since the development of the lands never took place and the purchase monies paid by ARD had been ordered to be refunded, ARD held the lands as constructive trustee for the appellants.
- E **Held**, dismissing the appeal and affirming the decision of the COA but varying the order of the High Court to read that ARD return the two pieces of land to the appellants upon receiving full refund of the purchase prices it had paid for them:
- F (1) There was nothing in the CJ that could be construed to say that the performance of one condition (such as repayment of the loan) was subject to a pre-condition that the JVA first had to be in place. The CJ did not say that the loans would be repaid from the proceeds of the joint venture. Just because the parties had agreed that the maturity date for the repayment of the loans be extended to 27 July 2012 and the JVA be
- G signed by 11 August 2010 and that if on the maturity date payments remained outstanding the parties could negotiate for restructuring of the loan facilities, did not make the clauses in the CJ dependent on each other. There was no precondition for the repayment of the loan sums and the repayment was not dependent on the conclusion of the JVA. The
- H borrowers had clearly agreed in cl 3 of CJ to pay back the loan facilities by the maturity date of 27 July 2012 (see paras 30–31 & 33–34).
- I (2) The performance of the clauses in the CJ did not depict any particular order of performance so as to enable the invocation and application of ss 53 or 55 of the Contracts Act 1950 (see para 32).
- (3) The facts showed that the appellants were clearly indolent and unwilling to enter into the JVA and this was the basis on which the High Court granted the declaration sought by the respondents, particularly ARD, to be released from performing their obligation to enter into the JVA as per

cl 9 of the CJ. Releasing the respondents (ARD) from performing cl 9 for good reason did not amount to a setting aside or a variation of cl 9. The declaration granted accorded with the trite principle of law that where one party refused to perform an agreement, the other party could treat itself as discharged (see paras 48–49).

- (4) Since the High Court had allowed the respondents' counterclaim for refund of the purchase prices for the two lands, a consequential order should have been made for the lands to be returned to the appellants. The failure to make such an order invited this court's appellate intervention. Instead of pursuing with arguments on the applicability of the principles of constructive trust, what the appellants ought to have sought for was this consequential order to be made (see para 58).

[Bahasa Malaysia summary]

Abdul Razak bin Sheikh Mahmood, si mati, ('Abdul Razak') telah membuat amanah ('amanah tersebut') dengan melantik Amanah Raya Bhd ('ARB') sebagai pemegang amanah. Lebih kurang setahun kemudian, Amanah Raya Capital Sdn Bhd ('ARC') telah memberikan pinjaman RM5 juta setiap seorang kepada Abdul Razak dan kepada perayu pertama ('A1'). Abdul Razak, A1 dan RB kemudian memutuskan untuk membangunkan sebidang tanah yang dimiliki oleh amanah tersebut. Bagi tujuan pembangunan, satu plot tanah bersebelahan telah diperolehi oleh Abdul Razak, A1 dan seorang lagi ('Kalsombi') melalui sebuah syarikat ('Excel Beat') dengan tujuan untuk melaksanakan satu usahasama dengan Amanah Raya Development Sdn Bhd ('ARD') yang mana kedua-dua tanah tersebut telah dijual untuk jumlah keselurunya RM5.8 juta. Berikutan itu, Abdul Razak, A1, Kalsombi dan Excel Beat ('plaintif-plaintif') telah menyaman ARB, ARC, ARD dan Amanah Raya Investment Management Sdn Bhd ('ARIM') kerana melanggar amanah dan/atau kewajipan fidusiari termasuk pelbagai pelanggaran kewajipan dan salah pengurusan oleh ARB sebagai pemegang amanah. Pihak-pihak telah memasuki penghakiman persetujuan ('PP') yang mana ia telah dipersetujui, antara lain, bahawa: (a) tarikh matang untuk Abdul Razak dan A1 untuk membayar semula pinjaman dilanjutkan selama dua tahun sehingga 27 Julai 2012; dan (b) peminjam-peminjam atau penama-penama mereka hendaklah memasuki perjanjian usahasama ('PUS') dengan ARD atau penama-penamanya pada atau sebelum 11 Ogos 2010 untuk membangunkan tanah-tanah tersebut. Usahasama yang dicadangkan tidak berlaku kerana pihak-pihak tidak dapat bersetuju dengan terma-terma PUS itu. Dua tahun kemudian PP telah dimasuki, plaintif-plaintif menyaman ARB, ARC dan ARD untuk, antara lain, satu perintah agar PP itu diketepikan. Defendan-defendan menuntut balas untuk: (i) satu deklrasi bahawa mereka, khususnya, ARD, dibebaskan daripada apa-apa obligasi untuk memasuki PUS itu; dan (ii) satu perintah agar harga-harga belian dibayar oleh ARD untuk dua tanah tersebut dikembalikan kepadanya. Semasa perbicaraan yang sama,

- A mahkamah telah membenarkan guaman ARC terhadap Abdul Razak dan A1 untuk mendapat balik jumlah tertunggak di bawah pinjaman-pinjaman. Rayuan ini adalah terhadap pengesahan Mahkamah Rayuan berhubung keputusan Mahkamah Tinggi dalam kedua-dua guaman itu. Semasa perbicaraan rayuan in, perayu-perayu berhujah bahawa PP tersebut
- B mengandungi janji dan obligasi bersama dan bahawa obligasi mereka untuk membayar balik pinjaman-pinjaman pada tarikh matang yang dilanjutkan tidak timbul jika pihak-pihak tidak memasuki PUS itu sebagaimana dipersetujui. Perayu-perayu bergantung kepada ss 53 dan 55 Akta Kontrak 1950 untuk menunjukkan bahawa 'order of performance of obligations' perlu
- C dipatuhi. Perayu-perayu berhujah bahawa mahkamah bawahan tidak patut melepaskan responden-responden daripada obligasi-obligasi mereka untuk memasuki PUS itu tanpa sama-sama melepaskan perayu-perayu daripada obligasi mereka di bawah PP itu dan bahawa dengan hanya melepaskan responden-responden, mahkamah bawahan telah secara berkesan
- D mengetepikan atau mengubah sebahagian PP itu. Perayu-perayu juga berhujah bahawa oleh kerana pembangunan tanah tersebut tidak berlaku dan wang belian yang dibayar oleh ARD telah diperintahkan untuk dikembalikan, ARD memegang tanah-tanah tersebut sebagai pemegang amanah konstruktif untuk perayu-perayu.

E **Diputuskan,** menolak rayuan dan mengesahkan keputusan MR tetapi mengubah perintah Mahkamah Tinggi untuk memutuskan agar ARD mengembalikan dua bidang tanah kepada perayu-perayu selepas menerima bayaran balik sepenuhnya untuk harga-harga belian yang dibayarnya untuk

F mereka:

- (1) Tiada apa-apa dalam PP tersebut yang boleh ditafsirkan sebagai menyatakan pelaksanaan satu syarat (iaitu bayaran balik pinjaman) adalah tertakluk kepada prasyarat yang PUS patut ada terlebih dahulu. PP itu tidak menyatakan bahawa pinjaman-pinjaman akan dibayar balik
- G daripada hasil usahasama. Hanya kerana pihak-pihak bersetuju bahawa tarikh matang untuk bayaran balik pinjaman-pinjaman itu dilanjutkan kepada 27 Julai 2012 dan PUS itu ditandatangani oleh 11 Ogos 2010 dan bahawa jika pada tarikh matang bayaran-bayaran itu masih
- H tertunggak pihak-pihak boleh berunding untuk menstruktur semula kemudahan pinjaman, tidak menjadikan fasal-fasal dalam PP tersebut bergantung kepada satu sama lain. Tiada prasyarat untuk bayaran balik jumlah pinjaman itu dan bayaran balik itu tidak bergantung kepada kesimpulan PUS tersebut. Peminjam-peminjam dengan jelas telah
- I bersetuju dalam PP untuk membayar balik kemudahan pinjaman pada tarikh matang 27 Julai 2012 (lihat perenggan 30–31 & 33–34).
- (2) Pelaksanaan fasal-fasal dalam PP itu tidak menunjukkan apa-apa susunan pelaksanaan tertentu bagi membolehkan penggunaan dan pemakaian ss 53 dan 55 Akta Kontrak 1950 (lihat perenggan 32).

- (3) Fakta menunjukkan bahawa perayu-perayu jelas malas dan enggan untuk memasuki PUS dan ini adalah asas yang mana Mahkamah Tinggi memberikan deklarasi yang dipohon oleh responden-responden, khususnya ARD, agar dilepaskan daripada melaksanakan obligasi mereka untuk memasuki PUS sebagaimana fasal 19 PP tersebut. Pelepasan responden-responden (ARD) daripada melaksanakan fasal 19 untuk sebab yang baik tidak merupakan suatu penepian atau pengubahan fasal 9. Deklarasi yang dipohon berdasarkan prinsip undang-undang bahawa di mana satu pihak enggan melaksanakan perjanjian, pihak lain boleh menganggap ia dilepaskan (lihat perenggan 48–49). A
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- (4) Oleh kerana Mahkamah Tinggi membenarkan tuntutan balas responden-responden untuk bayaran balik harga-harga belian untuk dua tanah itu, perintah berbangkit patut dibuat untuk tanah-tanah itu dikembalikan kepada perayu-perayu. Kegagalan untuk membuat perintah tersebut mempelawa campur tangan mahkamah rayuan ini. Sebalik meneruskan hujah-hujah berhubung pemakaian prinsip amanah konstruktif, perayu-perayu sepatutnya memohon perintah berbangkit ini dibuat (lihat perenggan 58). D
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Notes

For a case on conditional promises, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) para 7624.

Cases referred to

- Asia Pacific Parcel Tankers Pte Ltd v The Owners of the Ship or Vessel 'Normar Splendour'* [1999] 6 MLJ 652, HC (refd) F
- Cobbe v Yeoman's Row Management Ltd and another* [2008] 1 WLR 1752, HL (refd)
- Dial Kaur a/p Tara Singh v Mann Foong Realty Sdn Bhd* [2000] 3 MLJ 153, CA (refd) G
- Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457, PC (folld)
- Lim Kim Swee v Tan Meng San* [1960] 1 MLJ 262, CA (refd)
- Mars Equity Sdn Bhd v Tis 'Ata'ashar Sdn Bhd* [2006] 4 MLJ 302, CA (refd) H
- Pallant v Morgan* [1952] 2 All ER 951; [1953] Ch 43, ChD (refd)
- Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, FC (refd)
- SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177, FC (refd) I
- Scott & English (M) Sdn Bhd v Yung Chen Wood Industries Sdn Bhd* [2018] 5 MLJ 204; [2018] 6 CLJ 271, FC (refd)
- Stavers v Curling and Another* (1837) 132 ER 447 (refd)
- Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751, FC (refd)

- A *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465, FC (refd)
Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177, FC (refd)

Legislation referred to

- B Contracts Act 1950 ss 53, 55
 Federal Court Rules 1995 r 57(1)
 Public Trust Corporation Act 1995
 Rules of Court 2012 O 20 r 11
 Specific Relief Act 1950 s 41
- C **Appeal from:** Civil Appeal Nos W-02(NCC)(W)-541-04 of 2015 and W-02(NCC)(W)-547-04 of 2015 (Court of Appeal, Putrajaya)
- Ambiga Sreenevasan (Michael Chow with her) (Michael Chow) for the appellant. Cecil Abraham (Rishwant Singh and Daniel Chua with him) (Cecil Abraham & Partners) for the respondents.*
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Rohana Yusuf FCJ (delivering judgment of the court):

INTRODUCTION

- E [1] The appeal before us emanates from two appeals before the Court of Appeal involving three suits filed at the High Court. The first was Suit No 22NCC-375 of 2009 ('Suit 375') between the plaintiffs (Abdul Razak bin Sheikh Mahmood, Kamil Azman bin Abd Razak, Kalsombi bt VK Majid and Excel Beat Sdn Bhd) and the defendants (Amanah Raya Bhd, Amanah Raya Capital Sdn Bhd and Amanah Raya Investment Management Sdn Bhd). Parties had agreed to settle their disputes in Suit 375 which culminated in a consent judgment recorded on 28 July 2010.
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- G [2] The same plaintiffs then filed Suit No 22NCC-650-04 of 2012 ('Suit 650') against the same defendants for alleged breaches of the consent judgment. The defendants counterclaimed for a declaration to be released from any obligation to enter into a joint venture agreement ('JV agreement') pursuant to the consent judgment, and for the refund of purchase consideration made to the plaintiffs for two pieces of land. The claim of the plaintiffs was dismissed and the counterclaim was allowed by the High Court. The plaintiffs lodged an appeal in Appeal No W-02(NCC)(W)-547-04 of 2015 ('Appeal 547') against the decision in Suit 650, at the Court of Appeal.
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- I [3] Amanah Raya Capital Sdn Bhd ('ARC') had also filed Suit No 22NCC-1471-10 of 2012 ('Suit 1471') against Abdul Razak bin Sheikh Mahmood ('Abdul Razak') and Kamil Azman bin Abdul Razak ('Kamil Azman') for payment of the loan facilities granted to them. Suit 1471 and Suit 650 were heard together. The High Court had allowed the claim of ARC in

Suit 1471 against Abdul Razak and Kamil Azman for the repayment of the loans. Abdul Razak and Kamil Azman had lodged an appeal at the Court of Appeal in Appeal No W-02(NCC)(W)-541-04 of 2015 ('Appeal 541').

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[4] Both Appeals 547 and 541 were heard together before the Court of Appeal. In both appeals the decisions of the High Court in Suit 650 and Suit 1471 were affirmed by the Court of Appeal. Before us, the appeal was lodged by the plaintiffs as appellants who had obtained leave on three questions of law.

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THE BACKGROUND FACTS

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[5] By way of background, pursuant to a trust deed dated 13 October 2006, Abdul Razak (now deceased) created the ARSM Trust and appointed Amanah Raya Bhd ('ARB') as its trustee.

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[6] About one year later on 19 October 2007 and 17 September 2007 respectively, Amanah Raya Capital Sdn Bhd ('ARC') granted a loan of RM5m each, individually to Abdul Razak and Kamil Azman pursuant to two sets of agreement known as moneylending agreement ('secured loan'). Amongst the securities provided for the loan was the guarantee agreement executed by Kamil Azman, to personally guarantee on demand against all sums of money owed by Abdul Razak to ARC.

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[7] It was later agreed between Abdul Razak, Kamil Azman and ARB in the year 2008 that greater profits would be obtained by way of development of one of the trust properties held under HS(D) 406, PT No 287B, Section 41 Bandar Kuala Lumpur ('PT 287B'). For that purpose an adjoining land held under HS(D) 95437, Lot No 1396A (Lot 1396A) was acquired by the plaintiffs through Excel Beat Sdn Bhd ('Excel Beat') with a view of undertaking a joint venture development. Both PT 287B and Lot No 1396A were then sold to Amanah Raya Development Sdn Bhd ('ARD') at a price consideration of RM2,895,000 and RM2,905,000 respectively.

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[8] In October 2009 Abdul Razak, Kamil Azman, Kalsombi, and Excel Beat, sued ARB, ARC, Amanah Raya Investment Management Sdn Bhd ('ARIM'), and ARD in Suit 375, for breach of trust and or fiduciary duties on their part including various breaches of duties by ARB as trustee. Pursuant to Suit 375 the plaintiffs were seeking for a declaration that ARB was in breach of trust and mismanaging the ARSM trust.

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[9] A consent judgment was recorded on 28 July 2010 between ARB, ARD, ARC, ARIM with Abd Razak, Kamil Azman, Kalsombi, and Excel Beat over Suit 375. The content of the consent judgment as found at pp 84-86 of the

- A** common core bundle (*Jld* 1) is reproduced below in extenso for better appreciation of its application:
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- C**
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1. The Loan Facilities granted by the 2nd Defendant to the 1st and 2nd Plaintiffs on 23.10.2007 and 17.09.2007 respectively shall be extended for a period of 24 months commencing 28.7.2010.
 2. The 2nd Defendant agrees that the payment of the monthly interest payable for the 1st and 2nd Plaintiffs' respective Loan Facilities shall be deferred for a period of 24 months commencing 28.7.2010.
 3. The 1st and 2nd Plaintiffs agree that on the maturity date, which the parties agree to be on 27.7.2012, the following sums shall be payable to the 2nd Defendant:
 - 3.1 the 1st Plaintiff shall pay the 2nd Defendant the sum of RM4,226,783.05; and
 - 3.2 the 2nd Plaintiff shall pay the 2nd Defendant the sum of RM5,339,184.85.
 4. In the event that the above payments are not paid by the 1st Plaintiff and/or the 2nd Plaintiff on 27.7.2012 as stipulated, a default interest at the rate of 8%pa, calculated on a daily basis, will be charged on the total amount due and remaining unpaid or any part thereof, from the date the monies are due until the payment date.
 5. In the event that only part payment(s) of the amount(s) payable are made by the 1st Plaintiff and/or the 2nd Plaintiff on 27.7.2012, and subject only to the condition that the amount remaining outstanding as at 27.7.2012 from the 1st Plaintiff and the 2nd Plaintiff does not exceed RM2,000,000.00, the parties shall within 3 months from 27.7.2012 (unless mutually extended by the parties) *enter into negotiations to restructure their respective Loan Facilities which shall take into account the 1st Plaintiff's twenty-five percent (25%) interests in the Joint-Venture Agreement* referred to in paragraph 9 hereinbelow and the assignment of the said interest to the 2nd Defendant toward the repayment of the outstanding sums under the Loan Facilities.
 6. Pending the finalization of the restructuring of the Loan Facilities, the 2nd Defendant undertakes not to act on the securities furnished under the Loan Facilities. For the avoidance of doubt, the 2nd Defendant shall be entitled to act on the securities in the event that the 1st Plaintiff and/or the 2nd Plaintiff default(s) in their obligations under the terms of the restructured facilities and/or under the terms herein.
 7. The 1st and 2nd Plaintiffs shall, within 14 days hereof, write to all the Defendants hereinabove and to the Ministry of Finance, in form and substance as pre-agreed between the parties, withdrawing the 1st and 2nd Plaintiffs' complaints in its entirety.
 8. The 1st and 2nd Plaintiffs hereby agree to the withdrawal of their respective deposits in the Safecare Trust Fund Account maintained with

the 1st Defendant of RM56,326.99 each. The deposits shall be paid over to the 2nd Defendant to reduce the 1st and 2nd Plaintiffs' Loan Facilities to RM3,913,688.01 and RM4,943,689.68 respectively, calculated at 28.7.2010.

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9. The 1st Plaintiff and/or the 2nd Plaintiff and/or their nominated entity shall enter into a Joint Venture Agreement, in form and substance as pre-agreed between the parties, with the 4th Defendant and/or their nominated entity on/before 11.8.2010.

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10. The parties agree that they shall have no further claims against each other and undertake not to raise the allegations raised in this action in the future. (Emphasis added.)

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(The first plaintiff referred to in the consent judgment is Abdul Razak, the second plaintiff is Kamil Azman, the second defendant is ARC and the fourth defendant is ARD.)

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[10] The consent judgment, from our reading of it, deals with three main subject matters. Firstly, on the loan facilities. It was agreed by ARC that the period of loan granted to Abdul Razak and Kamil Azman would be extended, and the mode of repayment are spelled out in the various clauses. On the JV agreement, it was agreed that a JV agreement is to be entered into between Abdul Razak and Kamil Azman or their nominees, with ARD or its nominees. Finally, parties agreed not to have further claims or raise the same allegations in the future, against each other.

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[11] Nothing materialised from the consent judgment. Despite countless discussions, the terms of the JV agreement could not be performed. The main dispute centred on the issue that the plaintiffs had nominated ARSM trust as their nominee which was not agreed upon by ARB and its group. ARB could not agree to have ARSM as a nominee to contract the JV agreement because ARSM is not a legal entity and cannot be a party to the JV agreement, and it also was not a party to the consent judgment.

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[12] In the meantime, ARC had caused various demands to be made against Abdul Razak and Kamil Azman to pay up the loans. The demands were not adhered to. Hence the loan repayment too remained outstanding.

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[13] About almost two years after the consent judgment was recorded, the same group of plaintiffs, Abdul Razak and Kamil Azman together with Kalsombi and Excel Beat filed Suit 650 at the Kuala Lumpur High Court, against ARB, ARC and ARD on 28 April 2012 seeking, inter alia, for:

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- (a) specific performance of the JV agreement pursuant to the consent judgment dated 28 July 2010;

- A** (b) several declarations, including a declaration that the defendants acted in breach of trust; and
- (c) alternative prayers for restitution and an order to set aside the consent judgment.
- B** [14] The defendants counterclaimed in the same Suit 650, seeking for two main prayers. First for a declaration that they, and in particular ARD, be released from any obligation to enter into the JV agreement. The second prayer is for an order that ARD be refunded with the purchase consideration of the
- C** two pieces of land in the sums of RM2,895,000 and RM2,905,000, together with interest.
- D** [15] About five months after Suit 650 was filed, ARC on 1 October 2012 filed Suit 1471 against Abdul Razak for the repayment of the loan facilities in the sum of RM4,259,207.69 as well as Kamil Azman for loan repayment of RM5,380,142.98 together with the guaranteed loan to Abdul Razak in the sum of RM4,259,207.69 with interest at the prescribed rate, pursuant to the loan agreements.
- E** [16] Suit 1471 was heard together with Suit 650 at the High Court. In Suit 650 the claim of the plaintiffs was dismissed and the two items of the counterclaim by the defendants were allowed. Thus the counterclaim for an order that ARD be released from the obligation to conclude the JV agreement
- F** was allowed. The refund of purchase consideration of RM2,895,000 and RM2,905,000 was also allowed. There is however, a clear discrepancy in the order of the High Court with that of the grounds of judgment of the learned judicial commissioner ('JC') on the counterclaim for the refund of the purchase consideration. The fair order states that the counterclaim for the refund of
- G** purchase consideration paid by ARD was allowed, and the plaintiffs were ordered to refund ARD with the same together with interest thereon. In the grounds of judgment, the learned JC at para 57 dismissed this counterclaim. The plaintiffs appealed to the Court Appeal of this decision, in Appeal 547.
- H** [17] The claim of ARC for the repayment of the loans in Suit 1471 was allowed by the High Court, where Abdul Razak and Kamil Azman was ordered to repay the loan amount to ARC together with interest. The plaintiffs appealed on this decision in Appeal 541.
- I** [18] After hearing both appeals together the Court of Appeal affirmed the decisions of the High Court in both Suit 650 and Suit 1471. The appellants in the appeal before us are Kamil Zaman, Kalsombi, and Excel Beat and the respondents are ARB, ARD, and ARC.

[19] We note in particular that during the proceedings at the Court of Appeal, the respondents' counsel objected to the submissions made by the appellants on the issues of unjust enrichment, constructive trust and mutual promises. The objection was raised on the basis that these issues were not raised in the court below or in the pleadings. The objection was sustained by the Court of Appeal, except for the issue on mutual promises.

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[20] At the leave application before this court, the appellants proposed five questions to be determined. This court however on 20 November 2017 granted leave to the appellants only for the three following questions to be answered:

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- (a) where a consent order consists of mutual obligations and promises, is the court entitled to release one party of its obligation without releasing the other party?
- (b) whether a court may effectively set aside or nullify a part of a valid consent order particularly in the absence of allegations or findings of fraud, misrepresentation, coercion or undue influence; and
- (c) where property is purchased by one party (A) for the sole purpose of a joint venture with a second party (B) and the joint venture does not materialise, is the property so purchased held in constructive trust for both parties?

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CONSENT JUDGMENT AND MUTUAL PROMISES

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[21] We agree with the proposal by learned counsel for the respondents that both questions 1 and 2 are inter-related. We will thus discuss both these questions together in these grounds of judgment, bearing in mind that both of these questions begged the determination of the underlying issue as to whether the consent judgment constitutes mutual promises which are dependent on each other.

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[22] Before us, the appellants raised various issues to contend that the Court of Appeal, in affirming the decision of the High Court, had erred in the following areas:

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- (a) in releasing the respondents of their obligations under the consent judgment without releasing the appellants as well;
- (b) in failing to consider that the consent judgment consisted of mutual promises which were dependent upon each other; and
- (c) in setting aside a part of the consent judgment without any allegations or findings of fraud, misrepresentation, coercion or undue influence.

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- A [23] The bone of contention as canvassed by the learned counsel for the appellants is that the consent judgment constitutes mutual promises and obligations which are dependent on each other, hence the performance of one need not be done before the fulfilment of the other. Following that it was
- B contended that entering into the JV agreement and the repayment of loan facilities are mutual promises which form the consideration to the consent judgment making the performance of one promise a condition precedent to the performance of the other. It was then submitted that the order of
- C performance of the obligations in the consent judgment must adhere to s 53 of the Contracts Act 1950. By virtue of s 53, it was asserted that Abdul Razak and Kamil Azman were under no obligation to repay the loan until the JV agreement concludes. By reason of the failure to form the JV agreement, the appellants stood firm that, the obligation to repay the loan had not arisen, applying s 55 of the Contracts Act.
- D [24] In contending and construing that the consent judgment is indeed in the nature of mutual promises, learned counsel urged upon us to give due regards to the two following matters;
- E (a) that the parties agreed in the consent judgment for the loan repayment to be extended for 24 months where the maturity date fell on 27 July 2012, and the joint venture was supposed to be signed by parties on 11 August 2010 much ahead of the maturity date; and
- F (b) cl 5 provides to the effect that in the event that by the maturity date of 27 July 2012 the loan remained outstanding but not exceeding RM2m, the parties may negotiate to restructure the facilities and shall take into account the 25% interest of Abdul Razak in the JV agreement and the assignment of that interest to Kamal Azman towards repayment of the outstanding sum.
- G [25] Learned counsel then impressed upon us to infer therefrom that the consent judgment is one where there are reciprocal promises to be performed and that the performance of the promise by one party could not be claimed by the other until the other party's promise had been satisfied. And it is for this
- H reason it was submitted, ss 53 and 55 of the Contracts Act come into play. Various authorities were cited in support of that proposition.
- I [26] In response, the respondents assailed the basic thrust and the core contention of the appellants' case on this particular issue, by highlighting that the consent judgment does not constitute mutual obligations and promises which are dependent on each other. According to the respondents the High Court and the Court of Appeal had merely treated the obligations of the respondents discharged upon considering all the facts and circumstances leading to the non-performance of the obligation under the consent judgment.

[27] On these rival contentions, it became apparent to us that the very basic issue in dispute that needs to be resolved is whether or not the consent judgement may be construed as consisting of mutual promises that depend on each other in terms of the performance of the obligations contained therein. The only way to resolve it is by giving the consent judgment its proper construction. These issues too involved finding of facts and law and have been given interpretation by both the courts below.

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[28] In this regard we are mindful that this court in *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465, had ruled that a consent order is akin to a contract with superadded command of the court. Thus it must be given its full contractual effect. It is to be interpreted in the same manner as the court would a contract. The canons of interpretation are as familiar as any canons of construction would be to a legal practitioner. The paramount consideration is to ascertain the intention of the parties to the consent judgment. Such intention is to be objectively assessed by the court, in particular by reviewing the language employed in the consent judgment.

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[29] To recapitulate, the appellants chose to characterise the consent judgment as having mutual obligations and promises on two main reasons that we have alluded to, in para [24] viz; that the parties agreed to extend the loan repayment for 24 months to 27 July 2012 which was a date after the agreed date for the signing of the JV agreement of 11 August 2010 and secondly as per what is stated under cl 5 of the consent judgment. There is no doubt that the JV agreement was to be concluded much ahead of the maturity date of the loan. It is also true that cl 5 says in the event the loan which remained outstanding did not exceed RM20m by the maturity date of 27 July 2012, the parties may negotiate for the restructuring of the facilities. And in doing so, it was also provided that the 25% interest of Abdul Razak in the JV agreement, as well as the assignment of that interest to Kamil Azman towards repayment of the outstanding sum, must be taken into account. Now, how are these clauses of consent judgment dependent on each other.

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[30] We are not able to appreciate the line of argument put forth, to enable a legal construction and to classify the consent judgment as suggested by the appellants. From its clear wordings the consent judgment does not say that the repayment of loans would be made from the proceeds of the joint venture. The way we understand it, by the consent judgment it was agreed that the loan repayment would be extended from its original due date. It also provides for the eventuality of payment remaining outstanding. In that event, the parties contemplate negotiation for restructuring.

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[31] We are constrained to find ourselves in complete agreement with the respondents' counsel that there is nothing from all these clauses that can be

- A construed to say that the performance of one condition (such as repayment of loan) may be subject to a pre-condition that the JV agreement must first be in place. Just because parties agreed that the repayment be extended for 24 months where the maturity date fell on 27 July 2012, and the JV agreement was supposed to be signed by parties on 11 August 2010 much ahead of the
- B maturity date and the fact that if payment remained outstanding there is agreement to negotiate for restructuring, do not make the clauses in the consent judgment dependent on each other.
- C [32] In the circumstances, we are not able to appreciate that the performance of the clauses in the consent judgment depict a particular order of performance so as to enable us to invoke and apply s 53 or to employ the common sense order of precedence as envisaged by s 55 of the Contracts Act.
- D [33] We agree with the respondents that, it is amply clear that there is no precondition to the repayment of the loan sums. Looking at the surrounding background too, the fact was the loans were granted to both Abdul Razak and Kamil Azman on 17 September 2007 and 19 October 2007 respectively and the loan documents disclose that they were granted individually to each of
- E them. There is no reason to conclude that the loan payment was dependent on the conclusion of the JV agreement. Kamil Azman had given his personal guarantee to ARC against all the sums owed by Abdul Razak by way of a guarantee agreement, and he is correctly held to be liable to the claim of the respondents. Furthermore, there was no evidence adduced, as found by the
- F learned JC, to support the proposition that the obligation of Abdul Razak and Kamil Azman to pay the sums due under the loans is conditional upon the performance of the obligations under the joint venture.
- G [34] Hence the contention of the appellants that the obligations of the two borrowers Abdul Razak and Kamil Azman to pay ARC is contingent upon the performance of any obligation by ARC pursuant to the consent judgment, in particular the JV agreement, is bereft of any merit. They both as borrowers in fact agreed to personally pay back the loan facilities granted by the maturity date of 27 July 2012 as clearly stated in cl 3 of the consent judgment.
- H [35] We will echo the observation of the Court of Appeal where in the same tone at para 31 it was observed that:
- I 31. The terms of the consent judgment do not contain words which state that the repayment of the loan amount by the appellants are to be sourced from the proceeds of the joint venture. We must not lose sight that respective parties were represented by legal advisers and if that had been the intention of the parties, such wordings would have been easily inserted in the consent judgment. Without such clear words, the court cannot infer meanings as put forth by the appellants.

We agree with the Court of Appeal and we too have difficulty in discerning anything from the consent judgment which even remotely suggests that the repayment of the loan is conditional upon the conclusion of the JV agreement.

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[36] Learned counsel for the appellants cited s 53 of the Contracts Act that deals with order of performance of obligations in a contract. We note the clear order of performance as envisaged by s 53. Nothing in the consent judgment allows us to infer that any such order had been stipulated. What it says on the loan repayment is that the obligations to pay up the loans had been extended, and what it also provides for is the eventuality of the repayment remaining outstanding by the maturity date. There is nothing to suggest that the JV agreement must be in place before the loan is repaid.

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[37] The case cited by learned counsel, *Lim Kim Swee v Tan Meng San* [1960] 1 MLJ 262, which applied s 53 is of no assistance to the appellants' case here. In that case it was found by the court that the obligation to discharge the debt to one called Celho must first take place before the defendant was put in the position to transfer the land in question. Thus, before the debt to Celho was discharged and as agreed, the obligation to transfer the land by the defendant did not arise. Though the agreement did not spell out the order of performance of the parties' obligation, the court applied s 53 to rule that payment of loan was a pre-condition to the transfer of the land.

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[38] The decision of the Court of Appeal in *Mars Equity Sdn Bhd v Tis Ata'ashar Sdn Bhd* [2006] 4 MLJ 302 was cited to us by the appellants' counsel, to support the contention that both Abdul Razak and Kamal Azman were under no obligation to pay the loan before the JV agreement was signed. Again, this case is no authority to the appellants' contention. This case dealt with two contemporaneous agreements which formed the basis of agreement between parties, one to transfer the land from the respondent to the appellant, and the other was an agreement for the appellant to fell timber pursuant to the timber agreement. The Court of Appeal held that both documents executed contemporaneously formed one transaction, and must be read together. Hence, since the two documents read together did not fix the order of performance of each party's obligations, the court must look into the nature of transaction to determine that order. Section 55 of the Contracts Act was applied by the court, to rule that the respondent in that case was in breach of the duty to transfer the land to the appellant. It was held that the respondent was in no position to call for the performance of applying for licence under the timber agreement, before the transfer took place.

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[39] We find it clear that the principles enunciated in the authorities cited are not applicable to the background of the instant appeal. The factual matrix here do not call for the application of s 53 and s 55 of the Contracts Act. We

A agree with principle relied upon by learned counsel for the appellants as enunciated in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457: whether or not the promise of one party is conditional upon and precedent to the other's liability depends on the construction of the contract taken as a whole and the intention of parties, upon the surrounding
B circumstances. It was quoted in that case, the decision in an old English case of *Stavers v Curling and Another* (1837) 132 ER 447, which propounded the principle that, besides looking at the documents and intention of parties, the application of common sense to each particular case, must not be precluded. Such is the principle incorporated into s 55 of the Contracts Act.

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[40] The case of *Dial Kaur a/p Tara Singh v Mann Foong Realty Sdn Bhd* [2000] 3 MLJ 153 is a Court of Appeal decision which dealt with an agreement culminated from a letter exchanged between solicitors. The obligation of the
D defendant was to execute transfers of eight titles to the plaintiff. Then it spells out the obligation of the plaintiff to settle an amount due to the bank to redeem the eight titles of the plaintiff's plus 23 titles of the defendant. The agreement did not provide an order of performance of the obligations. It was found by the
E court that the agreement contained reciprocal promises of parties such that the performance of the promise by one party could not be claimed by the other, till the other party's own promise had been performed. Thus it was held, applying s 55 of the Contracts Act, that the plaintiff could not make a claim for the transfer of the titles, before performing the obligation to pay up the bank to redeem the titles.

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[41] We further agree with the respondents' submissions that the consent judgment must be construed as a commercial instrument. The aim is to ascertain the contextual meaning of the relevant contractual language. It must be done objectively as to what a reasonable person, circumstanced as the actual
G parties in a commercial environment were, would have understood it to mean. This must be gathered from the language used and its relevant contextual sense (see *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177). Applying all the required principles of construction, in our view, both the Court of Appeal and the High Court had arrived at the
H correct conclusions that the repayment of loans is not conditional upon the parties entering into the JV agreement.

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[42] The appellants in characterising the consent judgment as they did, to avail themselves of s 55, are therefore misplaced. We are further reinforced in our view, by referring to *Pollock & Mulla The Indian Contract and Specific Relief Acts* (Vol 1) (updated 14th Ed, LexisNexis 2013) where learned author at p 842 observes that:

Section [55] applies when the promises are reciprocal and dependent. It does not apply to 'entire contracts', where the performance of one promise is completely

independent of the performance of the other.

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[43] The appellants had also raised an argument on the distinction between contracts in which obligations are entire and divisible. Again this argument would only serve as an academic information and is of no application to the consent judgment here, in view of our finding.

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WHETHER THE CONSENT JUDGMENT IS VARIED OR SET ASIDE

[44] The next complaint of the appellants was that the court below, in releasing the obligation of the ARD from entering into the JV agreement with the appellants, had erroneously done so. Learned counsel held the view that this part of the order is in effect setting aside cl 9 of the consent judgment. It is therefore erroneous in law, since a valid consent order may only be set aside on specific grounds of fraud, misrepresentation, coercion, and undue influence. None of these, it was said, had been alleged or presented in the instant appeal to warrant the setting aside or variation of the consent judgment by the High Court. Further to that, it was also contended that the release of one party and not the other from the consent judgment is completely wrong in law.

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[45] Responding to the submissions, learned counsel for the respondents controverted the basic premise of the case of the appellants that the order of the High Court in releasing ARD from cl 9 of the consent judgment amounts to a variation or a setting aside of the consent judgment, or part of it. Learned respondents' counsel elucidated the point that the prayer of the respondents in its counterclaim merely sought for a declaration by the court for ARD to be released of its obligation to enter the JV agreement but never seeking for that relevant clause to be set aside. The difference being that, a declaratory order merely pronounces the legal state of affairs. This differs from a coercive judgment. A coercive judgment is enforceable by the court but not a declaratory order.

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[46] Citing in support of the above proposition is the decision in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 where it was observed that all a declaratory order does is to declare the rights of parties. The distinction is well explained by Zamir and Woolf in *The Declaratory Judgment* (Sweet & Maxwell, 2011). In *Asia Pacific Parcel Tankers Pte Ltd v The Owners of the Ship or Vessel 'Normar Splendour'* [1999] 6 MLJ 652, this legal position was reiterated. Declaratory judgment is also discretionary in nature as specified under s 41 of the Specific Relief Act 1950, and as expounded in *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177.

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[47] We pause to examine the nature of the order made by the High Court

- A in this regard. We observe that the respondents did seek for a declaration for the respondents, in particular ARD, to be released from performing its obligation under cl 9 of the consent judgment. The learned JC was fully aware that the validity and sanctity of the consent judgment is to be observed. Repeatedly in the judgment, His Lordship remarked that the consent judgment could not be
- B set aside despite being sought by the appellants themselves in Suit 650. It is pertinent to note, the prayer of the appellants to impugn the consent judgment was dismissed as the learned JC found no fraud, undue influence, coercion or the likes was pleaded or established as its basis. As held by the learned JC it was
- C merely premised on an allegation that the respondents had no intention to honour the terms of the same. However, if we were to look at the reasons offered by the respondents in the prayer seeking for a declaration for the release of ARD, we note that it was based on a multitude of reasons both factual and legal.
- D [48] In our observation the reasons which led to the order to release ARD, made by the High Court appeared to be for the following. The deadline agreed for the JV agreement to be finalised, was 1 August 2010. Discussions commenced between parties with the draft agreement circulated for
- E comments. The appellants were dragging the discussions and the conclusion of the agreement, and insisted in nominating ARSM trust as their nominee despite objections by ARB on the basis that ARSM is not a legal entity and not a party to the JV agreement nor the consent judgment. A couple of extensions of time were granted by the respondents at the request of the appellants to
- F conclude the agreement but it came to no avail. Finally, the respondents (ARB) wrote to the appellants giving an ultimatum for the JV agreement to be executed by 7 June 2011. The appellants however insisted on nominating ARSM Trust as their nominee. By 8 June 2011 all discussions ceased which led to Suit 650 being filed by the appellants. On all accounts the appellants were
- G clearly indolent and unwilling to enter into the JV agreement. These formed the basis of the High Court granting the declaration sought by the respondents (ARD).
- H [49] The High Court was correct to release the respondents (ARD) from performing cl 9 but such order cannot amount to a setting aside or a variation of that part of the consent judgment. The declaration granted is in accord with the trite legal principle that, where one party refuses to perform an agreement, the counterparty may treat himself as discharged. The High Court therefore did not set aside cl 9 or vary the same but had simply declared that the
- I respondents' obligation under that clause was discharged on good reasons. Thus we find it clear that the appellants had once again clearly mischaracterised the order made by the High Court which was affirmed by the Court of Appeal, in declaring that the respondents need no longer perform the obligation to enter into the JV Agreement. We agree with the respondents that this is also a

case of mischaracterising the order made by the High Court. The High Court did not set aside cl 9 but merely declared that the respondents particularly ARD were released from performing their obligations under cl 9 of the consent judgment.

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[50] Having made our observation in the above analysis, we now re-examine questions 1 and 2 posed. Both these questions presuppose the characterisation that the consent judgment consists of mutual obligations, the performance of which are dependent on each other. This presupposition was very much disputed. Both the courts below had made their findings of facts and law that the appellants indeed had mischaracterised the consent judgment. We are in complete agreement with those findings. That being the position, we are of the view that the first two questions would not determine the outcome of this appeal. We therefore do not find it necessary in the circumstances for these two questions to be answered.

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CONSTRUCTIVE TRUST

[51] In deliberating on leave question 3, learned counsel for the appellants sought to advance an issue on the applicability of the principle of constructive trust over the property purchased by ARD from the appellants for development purposes, which never materialised. Constructive trust it was submitted, attaches by law to specific property which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of it. This court in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 observed that constructive trust is an imposition of law irrespective of the parties' intention. The concept of constructive trustee operates on the basis of whether justice and good conscience demand for its application.

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[52] On the factual matrix of the present appeal it was argued that the trust deed of the ARSM trust in cl 12 provides that in deciding to develop or sell any property the decision must be by a majority and must have regard that the preference is developing the property instead of selling it. The trust property PT 287B and the acquired adjoining Lot 1396A were acquired for consideration by ARD, for the purpose of developing them for sale. This was all within the knowledge of ARB and ARD.

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[53] Learned counsel for the appellants proceeded to contend that ARD should not keep these lands despite making payment for the same. It was submitted that it would be a case of an unjust enrichment for ARD to retain these lands as the sole purpose of transfer was for development purpose under the JV agreement and nothing else. Learned counsel contended therefore that ARD is holding the lands as constructive trustee, applying the principle as enunciated in *Pallant v Morgan* [1952] 2 All ER 951; [1953] Ch 43, and as

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- A summarised in *Cobbe v Yeoman's Row Management Ltd and another* [2008] 1 WLR 1752. According to the appellants the transfer to ARD in this case, was not an outright sale but with the intention of having the JV agreement in mind and ARD is therefore holding the lands as constructive trustee. And this was said to be consistent with the object of ARSM trust.
- B [54] In response the respondents called into question the appellants' right in raising any issue on constructive trust on the basis that;
- C (a) constructive trust was not the pleaded case of the appellants;
- (b) the Court of Appeal had sustained the preliminary objection raised by the respondents that the appellants be refrained from raising issues of constructive trust, and unjust enrichment but allowed only the point on mutual obligations to be raised; and
- D (c) that the appellants had failed to, inter alia, state the ground of objection to the decision appealed against and the points of law or fact which are alleged to have been wrongly decided, as required by r 57(1) of the Federal Court Rules 1995, which deals with how a memorandum should be filed.
- E [55] We have perused the pleaded case of the respondents (ARD) for the refund of the purchase consideration. At para 10 of the re-amended defence and amended counterclaim, ARD admitted purchasing the lands at market price and thereby sought for the refund of the purchase consideration, in the event the court found that the commercial activities undertaken by the respondents' group of companies ultra vires the Public Trust Corporation Act 1995 as alleged. The issue on ultra vires was not proceeded with by the appellants at the Court of Appeal.
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- G [56] It must be noted that the amended defence and counterclaim at para 22 prays for the refund, only in the event the commercial activities undertaken by the respondents are ruled to be ultra vires. The learned JC in the grounds of judgment had clearly pronounced that the counterclaim for the refund of the purchase consideration stood dismissed. The fair order on the other hand,
- H states that the prayer for the refund of the purchase consideration is allowed, together with interest as prayed. in the circumstances the fair order had to be given cognisance.
- I [57] An order of the High Court which had been sealed will render the High Court functus officio, save and except to correct clerical errors under the slip rule. This is the position as stated under O 20 r 11 of the Rules of Court 2012. This trite position has been reiterated in the recent decision by this Court in *Scott & English (M) Sdn Bhd v Yung Chen Wood Industries Sdn Bhd* [2018] 5 MLJ 204; [2018] 6 CLJ 271. The same fair order had also been affirmed by the

Court of Appeal where the decision of the High Court was affirmed.

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[58] Following the fair order, the High Court had allowed the counterclaim of the respondents for the refund, and the appellants were ordered to refund the purchase consideration with interest, running from the date the amount was paid by ARD to the appellants. Despite ordering refund of the purchase consideration, we note that the learned JC had failed to make a consequential order, for the lands to be returned to the appellants. Thus, this failure invites this court's appellate intervention. Instead of pursuing with the argument on the applicability of the principles of constructive trust, what the appellants ought to have sought for is this consequential order to be made.

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[59] We again decline to answer question 3 as we are clear that the submission on constructive trust is of no relevance. We therefore affirm the decision of the Court of Appeal and, in the interest of justice, make a consequential order for the respondents (ARD) to return the lands to the appellants after full price consideration as per the High Court order is made.

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[60] On the whole, in our view the appellants had woven some legal intrigues, bereft of credible facts and legal findings by the courts below, in characterising the consent judgment as they did. That being the case the argument of the appellants based on the purported characterisation must fail. The Court of Appeal had made a ruling disallowing the issue, inter alia, on constructive trust. The ruling of the Court of Appeal was not protested against, instead the appellants proceeded to submit on the issue of constructive trust, as though such a ruling was never made.

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[61] Having deliberated on all the issues raised before us and having reached the conclusions that we did, the appeal of the appellants must fail and be dismissed. We therefore unanimously dismiss the appeal with costs. This is subject to the variation of the order of the High Court as affirmed by the Court of Appeal, for ARD to cause the two pieces of land to be returned to the appellants, upon full refund of purchase consideration as ordered by the High Court.

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Order accordingly.

Reported by Ashok Kumar

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